Supreme Court, U.S.
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No. 95-234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TED MARK MONK,

Petitioner,

v.

QUALITY ELECTRIC SUPPLY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 53 F.3d 1381 (3d Cir. 1995); the opinion of the district court (Pet. App. 28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1995. On May 4, 1995, petitioner filed a petition for rehearing and rehearing en banc. On May 15, 1995, the court of appeals denied this petition. Pet. App. 41a. The petition for certiorari

was filed on August 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).[1]

STATEMENT

This is a common law personal injury case arising from an accident in which petitioner Ted Mark Monk, an employee of Benak Construction Company ("Benak"), an independent construction contractor, suffered electrical burns when a metal beam he was holding in the course of a construction project came into contact with energized power lines maintained by the Virgin Islands Water and Power Authority ("WAPA"). Petitioner filed suit in federal district court in the United States Virgin Islands against WAPA and respondent Quality Electric Supply Company ("Quality Electric"),[2] which had hired Benak and owned the land on which the work was being performed. Petitioner alleged claims of negligence and failure to maintain a safe workplace.

The undisputed record before the district court showed that "[a]t all relevant times, the Benak construction crew knew that the power lines [on the site] were energized and posed a possible danger." Pet. App. 30a. Quality Electric had addressed the issue of the power lines with Benak, and Benak "accepted that it was their responsibility to deal with the power lines and to contact WAPA about possible dangers posed by the lines." Pet. App. 34a. Petitioner's own testimony, as well as that of witnesses, showed that petitioner in particular "was acutely aware of the danger posed by the energized lines" and that, in his role as foreman, he had "warned others about the possible risk[.]" *Id.* at 30 n.2. Despite his awareness of these risks, petitioner chose not to use a rope for installing a particular metal joist but instead

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[1] Contrary to petitioner's misstatement (Pet. 2), jurisdiction in the district court rested not on diversity, but on the court's concurrent original jurisdiction over certain local disputes of Virgin Islands law, as provided for in the Revised Organic Act, 48 U.S.C. § 1612(b) (1988), and in 4 V.I.C. § 32(a) (1967 & Supp. 1995). (Pet App. 3a, 28a).

[2] Quality Electric has no non-wholly owned subsidiaries.

held the beam with his hands and was shocked when the beam touched a power line. The undisputed facts also showed that Benak and its employees, and not Quality Electric, controlled the work site. Pet. App. 34a.

On this record, the district court granted respondent's motion for summary judgment. The district court first reasoned that Quality Electric could not be negligent under Restatement (Second) of Torts § 413 (1965) (the "Restatement"), which provides for liability when an employer hires an independent contractor to conduct risky work and fails to exercise reasonable care or take special precautions.[3] Assuming that section was even applicable to the facts presented, Quality Electric could not be liable because (1) it did not retain control of the work site, and (2) in the alternative, it adequately met its obligation of "reasonable care." Pet. App. 33a-36a.

The district court also rejected petitioner's theory of liability under Restatement (Second) of Torts § 343A (1965), which provides that possessors of land may be liable to their invitees if the possessor should anticipate known or obvious dangers.[4] The court held that all of the undisputed facts showed that petitioner's

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[3] Section 413 provides:

> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
>
> (a) fails to provide in the contract that the contractor shall take such precautions, or
>
> (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

[4] Section 343A provides in relevant part:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

conduct had precipitated his injuries, so that he had effectively assumed the risk of injury and it would be unfair to try to shift the liability to Quality Electric. Pet. App. 36a-38a.

Petitioner appealed the grant of summary judgment for respondent.[5] The United States Court of Appeals for the Third Circuit found that the facts relied on by the district court were undisputed, Pet. App. 2a-3a & n.1, 13a, 27a, and affirmed. The court of appeals first held that a form of the common law assumption of the risk defense, implicit in § 343A of the Restatement, remains valid under Virgin Islands law notwithstanding the Virgin Islands' adoption of a comparative negligence statute. Pet. App. 4a-12a. Because petitioner was aware of and consented to a "known or obvious" danger, Quality Electric could not be liable as a possessor of land.

The court of appeals then held that the word "others" in § 413 of the Restatement does not encompass the employees of an independent contractor, so that Quality Electric could not be liable for negligence under this section. The court of appeals recognized that Virgin Islands courts were divided on this issue of interpretation, but it was persuaded by the history of § 413, the policy reasons behind the rule excluding the employees of independent contractors, and the fact that "an overwhelming majority of state high courts to consider the issue have held that employers are not liable" to the employees of independent contractors. Pet. App. 20a. The court of appeals therefore concluded that "the interpretation chosen by the overwhelming majority of jurisdictions" should be the rule in the Virgin Islands. Pet. App. 24a-25a.

The petition for certiorari does not contest the court of appeals' holding with respect to § 343A of the Restatement and does not cite that section.

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[5] WAPA also had moved for summary judgment, but the district court denied that motion. Petitioner subsequently settled with WAPA. Pet. App. 38a, 3a.

ARGUMENT

The decision of the court of appeals interpreting § 413 of the Restatement (Second) of Torts is correct and does not merit further review by this Court.

1. Petitioner's argument boils down to nothing more than a disagreement with the merits of the court of appeals interpretation of local Virgin Islands law. The petition raises no issue of constitutional or federal statutory interpretation. Neither does it assert any conflict among the federal circuits on an issue of federal law. Indeed, the case presents federal issues at all only in the limited sense that all law applied in the Virgin Islands rests on the sovereign authority of the United States, and enactments of the territorial legislature are adopted pursuant to the Revised Organic Act of the Virgin Islands, 48 U.S.C. §§ 1541 et seq. (1988 & Supp. VI). *See Brow v. Farrelly*, 994 F.2d 1027, 1032 (3d Cir. 1993).

The petition does not even demonstrate a disagreement in judicial interpretations of Virgin Islands law under Chapter 15 of the Restatement, or among federal court interpretations of those provisions as they bear on the application of federal statutes. The federal cases cited in the opinion of the court of appeals which are construing federal law have all held that there is no liability on the part of an employer of an independent contractor to the contractor's employees. Pet. App. 21a n.31. At most, the court of appeals' opinion discloses that the state courts are not entirely uniform in their interpretations of Chapter 15 of the Restatement, which is a matter of state law. Pet. App. 19a-21a.

2. In any event, the decision of the court below is correct, and is not called into question by any of the assertions advanced by petitioner.

a. The court of appeals initially recognized that § 413 of the Restatement contains an ambiguity in that it does not define the term "others" to whom the employer of an independent contractor may be liable. Pet. App. 16a. The court of appeals could find no Virgin Islands law that was dispositive of whether the term

"others" encompasses the employees of independent contractors, *see id.*, and petitioner suggests none. The court of appeals therefore examined how § 413 and related rules have been interpreted in other jurisdictions.[6]

As the court of appeals noted, the "prevailing point of view [at the time the Second Restatement was adopted] is that there is no liability on the part of the employer of the independent contractor." Pet. App. 19a (internal quotations omitted). Neither the reporter for the Second Restatement nor a majority of state courts viewed the Restatement as changing the prevailing rule. The court of appeals followed "the interpretation chosen by the overwhelming majority of jurisdictions," *id.* at 24a-25a, and it articulated persuasive reasons for that interpretation. *Id.* at 21a-24a.

Contrary to petitioner's assertion (Pet. 6), the court of appeals did not disregard 1 V.I.C. § 4 (1995), which, absent local law to the contrary, makes the American Law Institute's Restatements of law the rules of decision in the Virgin Islands.[7] That section does not prohibit Virgin Islands courts, or the court of appeals, from interpreting the Restatements in the event of ambiguity. In fact, the statute expressly directs courts to examine the common law "as generally understood and applied in the United States" to

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[6] The court of appeals also followed its own precedents to the effect that where the Restatement is silent and a split of authority exists, courts should select the sounder rule. *See Polius v. Clark Equipment Co.*, 802 F.2d 75, 77 (3d Cir. 1986); *Wells v. Rockefeller*, 728 F.2d 209 (3d Cir. 1984).

[7] 1 V.I.C. § 4 provides:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

the extent that a common law rule is not "expressed" in the Restatement. That is precisely what the court of appeals did here.

Nor did the court of appeals, as petitioner suggests, "cho[ose] to read in an exception to the duty of the employer of an independent contractor under Section 413" that the American Law Institute had rejected. Pet. 5-6. The court of appeals discussed the Special Note that excluded employees of the independent contractor, a note that was included in an early draft of the Restatement (Second) of Torts but not ultimately adopted, only in the context of background to show what the "prevailing point of view" was at the time the Restatement was adopted. Pet. App. 19a (quoting Professor Prosser). The court of appeals did not purport to adopt the Special Note as law for the Virgin Islands, but instead relied on the fact that "an overwhelming majority of state high courts to consider the issue have held that employers are not liable to [employees of independent contractors]." Pet. App. 20a, 24a-25a.[8]

b. Petitioner's reference to the Workmen's Compensation Act, 24 V.I.C. § 284(b) (1993), does not call into question the correctness of the decision below. This argument was not raised either before the district court or before the Third Circuit panel. It was first asserted only in the petition for rehearing, and the court of appeals did not expressly consider it then. Pet. App. 41a-42a. In any event, while the Workmen's Compensation Act provides that workmen's compensation does not bar an injured employee from suing persons other than the employer, it does not purport to create any causes of action, or to override any common law rules or the Restatement. Petitioner cites no cases suggesting that this section is applicable to the facts of this case, and in any event the language "any person responsible for [the employee's] injuries" in § 284(b) simply begs the question of whether the

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[8] That so many state and federal courts have interpreted § 413 of the Restatement in a manner contrary to petitioner's preference simply highlights the weakness of his claim that the court of appeals somehow adopted a rule that the American Law Institute had rejected.

employer of an independent contractor is in fact "responsible."[9] Accordingly, even if petitioner had raised this statute before the district court or the Third Circuit panel, it would not have compelled a different result.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[9] Likewise, the Virgin Islands' legislature's explanation for its amendment to the workers' compensation statute, "to assist persons who are injured on the job and to assist the Department of Labor Workmen's Compensation Division in recouping monies it has expended on injured workmen from the wrongdoer" Pet. at 5 (internal quotations omitted), simply begs the question of who is the "wrongdoer." This language does not support petitioner's argument that Quality Electric was liable under Virgin Islands law.